Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-592

NORTHWEST STEELHEADERS COUNCIL
OF TROUT UNLIMITED,

Petitioner,

v.

UNITED STATES OF AMERICA,
QUINALT TRIBE OF INDIANS, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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October 17, 1975

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v.

UNITED STATES OF AMERICA,
QUINALT TRIBE OF INDIANS, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Northwest Steelheaders Council of Trout Unlimited respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 4, 1975, and the order denying the

application for rehearing en banc entered in this proceeding on July 23, 1975.

OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are included in the Appendix of petitioners, the state of Washington, and are incorporated by reference herein.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 4, 1975. A timely petition for rehearing en banc was denied on July 23, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Is the decision of the Ninth Circuit enjoining the state of Washington from managing its salmon and steelhead resource contrary to the decision of this Court in

Department of Game v. Puyallup Tribe, Inc., 414 US 44, 94 S Ct 330, 38 L Ed 2d 254 (1973), and to nine earlier decisions of this Court?

2. Is the decision of the Ninth Circuit allowing certain treaty tribes the extra-territorial right of self-regulating their own off-reservation fishery in the waters of western Washington contrary to the decision of this Court in Kennedy v. Becker, 241 US 556, 36 S Ct 705, 60 L Ed 1166 (1916)?

3. Is the decision of the Ninth Circuit allowing the District Court to act as perpetual fishmaster of the salmon and steelhead resource of western Washington contrary to the decision of this Court in Milliken v. Bradley, 418 US 717, 94 S Ct 3112, 41 L Ed 2d 1069 (1974)?

4. Is the decision of the Ninth Circuit that limits conservation of the salmon and steelhead resource only to regulations indispensable to spawning escapement contrary

to the decision of this Court in Puyallup Tribe v. Department of Game, 391 US 392, 88 S Ct 1725, 20 L Ed 2d 689, reh. den. 393 US 898, 89 S Ct 64, 21 L Ed 2d 185 (1968) as reaffirmed in Antoine v. State, ____US___, 95 S Ct 944, 43 L Ed 2d 129 (1975)?

5. Is the decision of the Ninth Circuit in affirming a complex fish allocation formula as a matter of equitable discretion ignoring the rights of other people contrary to the decision of this Court in Department of Game v. Puyallup Tribe, Inc., supra, and in Minnesota State Senate v. Beens, 406 US 187, 92 S Ct 1477, 32 L Ed 2d 1 (1972)?

6. Should this Court accept certiorari when the decision of the Ninth Circuit conflicts with the Washington Superior Court decision on remand from this Court in Department of Game v. Puyallup Tribe, Inc., supra, and may conflict with the appeal from that decision which has been argued but not

yet decided by the Supreme Court of Washington?

7. Should this Court accept certiorari when the decision of the Ninth Circuit sanctions the District Court issuing injunctions which leave the officials of Washington State in violation of either state or federal court injunctions on the same subject?

8. Should this Court accept certiorari when the decision of the Ninth Circuit sanctions the District Court interfering with the international relations of the United States by issuing injunctions against the state of Washington requiring it to disobey orders of the International Pacific Salmon Fisheries Commission over the protests of the Government of Canada?

STATUTORY PROVISIONS INVOLVED

United States
Indian Treaties

Tribe	Treaty
Hoh Indian Tribe ("Hoh Tribe")	Treaty with the Quinaeilt, et al. (Treaty of Olympia) July 1, 1855, and January 25, 1856, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 971.
Lummi Tribe of Indians ("Lummi Tribe")	Treaty of Point Elliott, January 22, 1855, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 927.
Makah Indian Tribe	Treaty with the Makah (Treaty of Neah Bay), January 31, 1855, ratified March 8, 1859, and proclaimed April 18, 1859, 12 Stat 939.
Muckleshoot Indian Tribe ("Muckleshoot Tribe")	Treaty of Point Elliott, supra, and also Treaty of Medicine Creek, December 26, 1854, ratified March 3, 1855, and proclaimed April 10, 1855, 10 Stat. 1132.
Nisqually Indian Community of the Nisqually Reservation ("Nisqually Tribe")	Treaty of Medicine Creek, supra.

Tribe	Treaty
Puyallup Tribe of the Puyallup Reservation ("Puyallup Tribe")	Treaty of Medicine Creek, supra.
Quileute Tribe of the Quileute Reservation ("Quileute Tribe")	Treaty with the Quinaeilt, et al, supra.
Quinault Tribe of Indians ("Quinault Tribe")	Treaty with the Quinaeilt, et al., supra.
Sauk-Suiattle Indian Tribe ("Sauk-Suiattle Tribe")	Treaty of Point Elliott, supra.
Skokomish Indian Tribe ("Skokomish Tribe")	Treaty of Point No Point, January 26, 1855, ratitifed March 8, 1859 and proclaimed April 29, 1859, 12 Stat. 933.
Squaxin Island Tribe of Indians ("Squaxin Island Tribe")	Treaty of Medicine Creek, supra.
Stillaguamish Indian Tribe ("Stillaguamish Tribe")	Treaty of Point Elliott, supra.
Upper Skagit River Tribe ("Upper Skagit Tribe")	Treaty of Point Elliott, supra.

Tribe	Treaty
Confederated Tribes and Bands of the Yakima Indian Nation ("Yakima Nation")	Treaty with the Yakimas, June 9, 1855, ratified March 8, 1859, and proclaimed April 18, 1859, 12 Stat. 951.

Revised Code of Washington

75.08.260
75.12.060
75.12.070
75.12.160
75.40.060
77.08.020
77.12.100
77.12.130
77.16.020
77.16.030
77.16.040
77.16.060

STATEMENT OF THE CASE

The United States brought this suit for declaratory and injunctive relief against the state of Washington to determine the treaty fishing rights of western Washington Indian tribes. The 1854 and 1855 Treaties each contain language similar to the following:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, [Two treaties, Point No Point, 12 Stat. 933, and Treaty with Makahs, 12 Stat. 939, refer to citizens of the United States] and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries,....on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens." (12 Stat 971, 927, 939, 933, 951, 10 Stat. 1132)

The District Court for the Western District of Washington allowed the intervention of fourteen Indian tribes but denied the intervention of all commercial and sports fishing groups. One commercial group, the Reefnetters, were allowed to intervene by another judge.

The case deals with the anadromous fish resource of western Washington.

Salmon and steelhead spawn on the banks of the clear mountain rivers that originate on the slopes of the Cascade Mountain range.

They migrate to the Pacific Ocean and spend most of their lives swimming in salt water. Then they return usually to the very stretch of river where they were born in order to reproduce, at which point the salmon die, though a small percentage of the steelhead may still live. On the way home they may have to overcome the swift currents of nature or the fish ladders of man.

In 1971, the Washington steelhead catch was 264,599, while the salmon catch in Washington was 7,777,093.

Most of the salmon are caught in marine areas by commercial fishermen who sell them to packers who in turn ship them all over the world. The sports salmon catch is in Puget Sound or other ocean waters since salmon usually do not bite and are not too tasty if caught in the rivers on the way back to spawn.

Steelhead are ocean going rainbow trout

similar to the trout caught in lakes around the country but usually grow to be much larger in ocean waters. (Special Publication No. 2 (Third Edition, 1970) of the American Fishery Society, A List of Common Scientific Names for Fishes from the United States and Canada, 17). Steelhead are a game fish under Washington law which means that they can only be caught by hook and line and cannot be legally caught in the nets of the commercial fishermen, RCW 75.04.070. Since the decision of the United States Supreme Court in Department of Game v. Puyallup Tribe, Inc., supra, steelhead are subject to taking in the nets of the treaty Indian fishermen which are usually downstream, i.e. ahead of the recreational angler.

Salmon are caught in Atlantic and Pacific waters and even in the Great Lakes, ROYCE, INTRODUCTION TO THE FISHERY SCIENCES,

91 (1972). Steelhead trout originate only in the rivers of the Pacific Northwest.

In western Washington there are 794 treaty Indian fishermen, 6,600 commercial fishermen, and 283,650 sports fishermen.

In the First Final Decision, the District Court decided:

1. The fourteen tribes have the right to fish for salmon and steelhead off reservation at their "usual and accustomed grounds and stations," which were defined in the opinion.

2. The state of Washington may not regulate the treaty Indian off-reservation fishery for any reason without first submitting the proposed regulations to the District Court for approval.

3. The District Court will only consider approving regulations necessary to assure proper escapement of fish for spawning and not for any other conservation

reason.

4. Tribes which the District Court finds to be qualified for self-regulation may not have their off-reservation fishing regulated by anyone.

5. The words "in common" in the treaties reserve to the treaty tribes the right to these fish:

a) All the fish they can catch on reservations; plus

b) All the fish they can eat; plus

c) All the fish they can use for ceremonies; plus

d) Fifty percent of all of the harvestable fish that reach their "usual and accustomed grounds and stations;"plus

e) All the fish they can catch by hook and line anywhere in Washington in the regular sports season; plus

f) All the fish they can catch with commercial gear anywhere in Washington

away from "usual and accustomed grounds and stations;" plus

g) Extra fish to replace the fish that do not reach the "usual and accustomed grounds and stations."

6. All other fishermen have no rights to fish but only a privilege.

7. The question of whether hatchery propogated fish paid for with the license fees and tags of sports fishermen are included within the treaty fishery is deferred initially to the state courts on remand from this Court in Department of Game v. Puyallup Tribe, Inc., 414 US 44, 94 S Ct 330, 38 L Ed 2d 254 (1973).

8. The District Court retained continuing jurisdiction.

The state of Washington appealed to the Ninth Circuit and the tribes cross appealed on the ground that no one could regulate their off-reservation fishery whether or

not they were "qualified" to be self-regulating. Northwest Steelheaders Council of Trout Unlimited, the largest sports fishing conservation organization in Washington, was allowed to intervene by the Ninth Circuit.

All parties briefed and argued to the Ninth Circuit the events that have occurred during the continuing jurisdiction phase. Here are some of the major rulings:

1. The hatchery fish are being included within the treaty fishery even though the state Superior Court has ruled to the contrary. The District Court says that it will only consider the matter after the Supreme Court of Washington has ruled.

2. The District Court is now supervising the allocation of fish by the state of Washington among non-Indian treaty fishermen.

3. The Indian treaty fishermen are

being allocated not fishing opportunities but specific numbers or percentages of fish. The steelhead sports fishery is primarily in the rivers up-stream from the Indian nets. On the Nisqually River in 1974, for example, the District Court awarded the Nisqually Tribe 72% of the steelhead catch plus ceremonial, subsistence, hook and line, ocean commerical and compensatory fish leaving the sports fishermen the chance of later catching what remains.

4. The District Court is including the "historic" reservation catch in the allocation and has ruled that on some rivers this could mean 100% of the harvestable run.

5. The District Court has issued injunctions against state courts and ordered the state not to comply with regulations of the International Pacific Salmon

Fisheries Commission, which manages the Fraser River salmon run in accordance with a 1937 Treaty between the United States and Canada (50 Stat. 1355).

The Ninth Circuit with one modification affirmed the decision of the District Court and Northwest Steelheaders Council of Trout Unlimited files this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

INTRODUCTORY

The basic thrust of the decisions of the District Court and the Ninth Circuit is that the state of Washington cannot be trusted to protect the rights of its citizens with treaty Indian fishing rights. The District Court found that there were 794 commercial Indian fishermen including part time fishermen, spouses and minor children. The total Indian population of Washington is 36,400, and the total population of all citizens is 3,424,300. U.S.

Statistical Abstract, U.S. Bureau of the Census, 1973.

The annual salmon catch alone has a yearly value of about $71,821,557. Department of Fisheries 1973 Annual Report. If the 794 Indian commercial fishermen get only fifty percent of the catch, each will have an annual income of over $45,000 for a few months of salmon fishing. For a family of five, all of whom participate in the fishing, this means $225,000 a year.

These petitioners, who are representative of sports fishermen, are neutral on the issue of the proper allocation of the comercial portion of this fishery between treaty Indian and non-treaty commercial fishermen.

The treaties are the solemn obligations of the United States and must be respected. Petitioners do not quarrel with the basic agreement that the treaty tribes have a

special fishery at usual and accustomed grounds and stations off-reservation, which may be regulated by the state only in the interest of conservation. Such a decision was made for the Columbia River in the United States District Court for the District of Oregon in 1969 involving the same treaties.[1/] The case was not appealed and is working well. Sohappy v. Smith (United States v. Oregon), 302 F Supp 899 (D. Or. 1969). But there the District Court recognizes that it cannot be a fishmaster. Management decisions are made for the Columbia River fishery by the "Compact" Commission, a joint body of the Oregon and Washington fish management agencies. The District Court retains continuing jurisdiction. The tribes appear before the Compact Commission and present their

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1/ A later appeal was taken on a separate issue in 1974.

views. If they believe that their special treaty rights are being violated, they can and do immediately get review and sometimes changes from the District Court. The District Court has also on occasion remanded questions to the Compact Commission for further consideration with court guidelines.

The District of Oregon experience is completely different from the horror story that is occurring in the Western District of Washington which is the basis of this petition for certiorari.[2/]

This is not a civil rights case. We are not here faced with the equal protection

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2/ Since the Ninth Circuit decision in U.S. v. Washington, the Oregon Court is exploring the extent to which it is bound by the Ninth Circuit decision which interprets the same treaties, but has a different factual record, for any exercise of equitable relief.

of the laws problem implicit in every civil rights case. Rather we are concerned with defining the special protection afforded by the treaties.

This is a conservation case. We are dealing with the protection of a diminishing resource of immense value. We respectfully urge this Court to consider this petition for certiorari with this in mind.

A. TO PREVENT THE USURPATION OF THE RIGHT OF WASHINGTON TO MANAGE AND CONSERVE ITS SALMON AND STEELHEAD RESOURCE.

Good management and conservation of the fragile salmon and steelhead resource requires expert unified state management. The decisions of the District Court and Ninth Circuit take this right and responsibility away from Washington and transfer it to a federal judge who is to act as perpetual fishmaster. Later on the federal judge will supervise only the state of Washington

while up to twenty-six separate Indian tribes will regulate their own fishing without supervision by anyone. The chaos that has already been created can only increase. Bad fish management cannot be good law.

1. THE DECISION OF THE NINTH CIRCUIT ENJOINING THE STATE OF WASHINGTON FROM MANAGING ITS SALMON AND STEELHEAD RESOURCE IS CONTRARY TO THE DECISION OF THIS COURT IN DEPARTMENT OF GAME v. PUYALLUP TRIBE, INC., 414 US 44, 94 S Ct 330, 38 L Ed 2d 254 (1973), (PUYALLUP II), AND CONTRARY TO NINE EARLIER DECISIONS OF THIS COURT.

The United States Constitution provides in the Tenth Amendment that:

> "Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The state of Washington entered the Union in 1889 with every right of the thirteen original states.

In Puyallup Tribe v. Department of Game, 391 US 392, 88 S Ct 1725, 20 L Ed

2d 689 reh. den. 393 US 898, 89 S Ct 64, 21 L Ed 2d 185 (1968), (Puyallup I) this Court in construing the Treaty involved in this case points out:

> "And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power....But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation provided the regulation meets appropriate standards and does not discriminate against the Indians...
>
> "The overriding police power of the State expressed in non-discriminatory measures for conserving fish resources, is preserved." (391 US 392 at 398, 399 (1968)).

This holding was approved in Puyallup II, supra.

Similar decisions were made by this Court in 1876, 1891, 1896, 1905, 1916, 1924, 1942, and 1962. McCready v. Virginia, 94 US (4 Otto) 391, 24 L Ed 248, (1876); Manchester v. Massachusetts, 139 US 240, 11 S Ct 559, 35 L Ed 159 (1891); Ward v.

Race Horse, 163 US 504, 16 S Ct 1076, 41 L Ed 244 (1896); U.S. v. Winans, 198 US 371, 25 S Ct 662, 49 L Ed 1089 (1905); Kennedy v. Becker, 241 US 556, 36 S Ct 705, 60 L Ed 1166 (1916); Lacoste v. Dept. of Conservation, 263 US 545, 44 S Ct 186, 68 L Ed 437 (1924); Tulee v. Washington, 315 US 681, 62 S Ct 862, 86 L Ed 1115 (1942); Organized Village of Kake v. Egan, 369 US 60, 82 S Ct 680, 7 L Ed 2d 573 (1962).

Contrary to these ten decisions of this Court, the Ninth Circuit held that the state of Washington cannot in perpetuity regulate treaty fishing EVEN WHEN LIMITED TO "THE INTEREST OF CONSERVATION" without the "advance judicial scrutiny" of the District Court. The Tenth Amendment reservation of the sovereign power of Washington becomes a recommending function. As to certain "self-regulating" tribes, the Ninth Circuit goes further and says that their

fishing may be regulated by no one. (The Opinion of the Ninth Circuit has not yet been reported, but has been reproduced in the Appendix to the brief of the petitioner, the State of Washington.)

The Puyallup cases require that state "regulation meet appropriate standards and does not discriminate against the Indians." (391 US 392 at 398) The District Court and Ninth Circuit in this case did not define appropriate standards for state regulation as mandated by this Court. Instead, they took away the right of Washington to manage its salmon and steelhead resource.

2. THE DECISION OF THE NINTH CIRCUIT ALLOWING CERTAIN TREATY TRIBES THE EXTRATERRITORIAL RIGHT OF SELF-REGULATING THEIR OWN OFF-RESERVATION FISHERY IN THE WATERS OF WESTERN WASHINGTON IS CONTRARY TO THE DECISION OF THIS COURT IN KENNEDY v. BECKER, 241 US 556, 36 S Ct 705, 60 L Ed 1166 (1916).

The Ninth Circuit held that certain

"qualified" tribes have the right "to regulate their own members in the interest of conservation free of state controls." The District Court wants all of the tribes in time to be self-regulating. The Ninth Circuit argues that "In a sense, the treaty cloaks the Indians with an extra-territoriality while fishing at these locations."

This holding is contrary to Kennedy v. Becker, supra, where this Court allowed New York to regulate the off-reservation hunting and fishing of the Seneca Tribe. The Tribe argued that it had sole sovereignty over its members when they were hunting and fishing on former tribal land conveyed with a reservation of the continuing right to hunt and fish. This Court there had to deal with the identical argument for extraterritoriality that is made by the Ninth Circuit in our case.

This Court said:

> "It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both." (241 US 556, at 563.)

Kennedy v. Becker was recently cited with approval in Puyallup I.

Possibly the most important precept of fishery science is the need for unified management of the resource. Two tribes are now self-regulating. Twelve more tribes were plaintiffs and the District Court also wants them to be self-regulating as soon as possible. This means that the following rivers can be completely and separately regulated as to season, area, gear, catch, or anything else by more than one tribe, with any coordination with the state of Washington or each other completely voluntary:

Puyallup River - Muckleshoot Tribe, Puyallup Tribe and Yakima Tribe

Hoh River - Hoh Tribe, Quileute Tribe

Dickey River - Hoh Tribe, Quileute Tribe

Bogachiel River - Hoh Tribe, Quileute Tribe

Colawah River - Hoh Tribe, Quileute Tribe

Soleduck River - Hoh Tribe, Quileute Tribe

Queets River - Hoh Tribe, Quinault Tribe

Quinault River - Hoh Tribe, Quinault Tribe

Big River - Makah Tribe, Sauk-Suiattle Tribe

Ozette Lake - Makah Tribe, Quileute Tribe

Carbon River - Muckleshoot Tribe, Yakima Tribe

Strick River - Mucklesoot Tribe, Yakima Tribe

White River - Muckleshoot Tribe, Yakima Tribe

Green River - Muckleshoot Tribe, Yakima Tribe

Black River - Muckleshoot Tribe, Yakima Tribe

Nisqually River mouth and surrounding bay - Nisqually Tribe, Yakima Tribe

Since many tribes are quite small, e.g., the Hoh Tribe has 62 members, Nisqually - 61, Stillaguamish - 94, much of the burden of regulation and enforcement will have to be handled by the commercial Indian fishermen themselves, who can have little objectivity about their own short-run economic interest.

The District Court has now established fishing rights for six additional tribes and five tribes have pending applications before the Court. This can cause even further duplicate and conflicting management over the same fish in the same rivers.

The Ninth Circuit notes that Kennedy v. Becker, supra, rejects "dual sovereignty" and agrees that the state "ordinarily" has the power to regulate. It then argues, "However, the district court has enjoined

the state's exercise of its power in order to advance the congressional policy of promoting tribal autonomy" (No citation provided). But any such Congressional policy must yield to the Constitution. The federal courts may only require that Washington exercise this power in ways that comply with Indian treaties.

3. THE DECISION OF THE NINTH CIRCUIT ALLOWING THE DISTRICT COURT TO ACT AS PERPETUAL FISHMASTER OF THE SALMON AND STEELHEAD RESOURCE OF WESTERN WASHINGTON IS CONTRARY TO THE DECISION OF THIS COURT IN MILLIKEN v. BRADLEY, 418 US 717, 94 S Ct 3112, 41 L Ed 2d 1069 (1974).

The Ninth Circuit requires "advance judicial scrutiny of all future state regulations affecting Indian treaty fishing rights." The District Court under its continuing jurisdiction has now gone further and entered an injunction against a Washington state court decision allocating a portion of the non-Indian treaty catch. This means

that the District Court will be the perpetual fishmaster of all fishing in western Washington by all user groups.

The concurring Ninth Circuit opinion recognizes "ratification of the role of the District Judge as a 'perpetual fishmaster,'" but argues that this is necessary because of the past denial of Indian rights. Actually, the District Court found a decade of cooperation with the tribes by the Washington Department of Fisheries. (384 F Supp 312, 392) The Department of Game sought to enforce the state statute making steelhead a game fish until instructed to the contrary by this Court in Puyallup II in November, 1973. Thereafter, the Department of Game immediately set a special commercial net season for the Puyallup Tribe.

The District Court decision as affirmed by the Ninth Circuit for the first time

quantified the Indian treaty fishing right by a specific allocation of fish. This had not been done for the first 119 years of the treaties. In other words, the plaintiff tribes acquired newly defined rights in this case. The only way there could be any justification for a federal judge acting as perpetual fishmaster is if there was a showing that the state of Washington will not carry out this decision, as it is ultimately defined by this Court. There is no such showing.

Fisheries management is a job for experts. The Washington Department of Fisheries for example, has 61 trained biologists among its 376 permanent employees and a total annual budget of $14,000,000 for its fisheries program. Department of Fisheries Operating Budget Program Summary, 12/4/73. The Department of Game has a total staff of 468, a fisheries budget of $2.4 million

and many trained biologists. Annual Report of Department of Game, July 1, 1972 - June 30, 1973, and 21st Biennial Report of Department of Game.

The Department of Fisheries makes over a hundred regulatory decisions a year, almost all of which are decided in an atmosphere where time is of the essence. Even modern computer technology cannot guarantee knowledge of when a run of fish will actually enter a river until the last moment.

A mistaken prediction of escapement needs may show no effect at the time, but result in extinguishing an entire run after two or three life cycles have been completed, CRUTCHFIELD and PONTECORVO, THE PACIFIC SALMON FISHERIES, A STUDY OF IRRATIONAL CONSERVATION, 167.

For example, starting in 1880 mistaken estimates of escapement needs and

overfishing by commercial fishermen virtually eliminated salmon in Southern California, NETBOY, THE SALMON, THEIR FIGHT FOR SURVIVAL (1974).

The Senior United States District Judge who is maintaining continuing jurisdiction in this case is not trained in the science of fish management. He has also been unavailable for long stretches of time when decisions that he reserved to himself had to be made. He was out of the jurisdiction and for a while in Africa and unavailable for judicial business from mid-September to mid-November, 1974 during part of the salmon season. He was out of the jurisdiction sitting in Nevada from December 2 to December 20,1974, during the winter steelhead season. For example, when the Department of Fisheries sought to limit the herring roe fishery to assure adequate spawning escapement, the Lummi Tribe opened a season for them-

selves and in 45 days took over 5.2 million pounds of herring. The Department of Fisheries sought an early injunction from the District Court but by the time the court would finally hear the matter, the fishing was finished and the matter moot.

Treaty Indians can place their nets across the entrances of the following fish hatcheries constructed and maintained by the state of Washington, which are located in their usual and accustomed grounds and stations:

1. George Adams - Skokomish Tribe.
2. Nooksak - Lummi Tribe.
3. Green - Muckleshoot and Yakima Tribes.
4. Puyallup - Puyallup and Nisqually Tribes.
5. Minter Creek - Puyallup Tribe.
6. Hood Canal - Skokomish Tribe.
7. Skagit - Skagit Tribe.
8. Chambers Creek - Nisqually and Puyallup Tribes.

Fishing at hatchery entrances can ruin the hatchery program by taking fish needed for eggs.

Every tribe with a reservation at or near the mouth of a river can put a fish trap across the river and catch every fish that enters the river. This includes reservations on the Sooes, Queets, Puyallup, Quinalt, Skokomish, Snohomish and Nooksack Rivers.

Recently, on September 13, 1975, by minute order dictated from New York City, the District Court appointed a committee to take over the regulatory decision making of the State Department of Fisheries on the Fall coho run. No one knows what will happen next.

In the case of Milliken v. Bradley, supra, this court struck down a school desegregation plan which would have required perpetual regulation by the District Court.

This Court there stresses:

> "But it is obvious from the scope of the inter-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first a de facto 'legislative authority' to resolve these complex questions,and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives." (94 S Ct 3112, at 3126, 3127)

The dissent of Mr. Justice Marshall in Milliken v. Bradley agrees that the District Court should not become a school superintendent, and argues that such usurpation of power will not occur on the facts of that case. The dissent states:

> "Our cases, of course, make clear that the initial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District Court. The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default." (94 S Ct 3112, at 3158)

> "Furthermore, there is no basis whatever for assuming that the District Court will inevitably be forced to assume the role of legislature or school superintendent. Were we to hold that it was its constitutional duty to do so, there is every indication that the State of Michigan would fulfill its obligation and develop a plan which is workable, administrable, financially sound and, most important, in the best interest of quality education for all of the children in the Detroit metropolitan area." (94 S Ct 3112, at 3159).

The Ninth Circuit's ratification of a perpetual fishmaster for western Washington is thus contrary to both the majority and dissenting opinions in the Milliken v. Bradley case. It does not give the state of Washington the opportunity of developing a proper plan for protecting Indian treaty rights as defined by the courts.

4. THE DECISION OF THE NINTH CIRCUIT THAT LIMITS CONSERVATION OF THE SALMON AND STEELHEAD RESOURCE ONLY TO REGULATIONS INDISPENSABLE TO SPAWNING ESCAPEMENT IS CONTRARY TO THE DECISION OF THIS COURT IN PUYALLUP I AS REAFFIRMED IN ANTOINE v. STATE, ___ US ___, 95 S Ct 944, 43 L Ed 2d 129 (1975).

This Court in the Puyallup cases reaffirmed the right of the state of Washington to regulate the fishing of the treaty tribes in the interest of conservation, but did not define conservation. The closest that this Court came was in footnote 14 in Puyallup I, where it rejected the definition of the Ninth Circuit in an earlier case that,".....the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation."

Thereafter, the Supreme Court of Washington defined conservation in Puyallup II; and the definition was not commented upon by this Court in its reviewing decision:

> "Very simply, it is wise use. When we put it in terms of salmon harvest, I would put it in three categories or three parts, by harvest, in management of salmon as a crop, one, there must be a surplus and over and above the needed spawning escapement to have an available crop and not be taking the feed stock. Two, the manner of fishing, itself, must be such that you can control it so that you do not dip into the seed stock ....

> The other thing is that the manner of fishing itself, must not be destructive." Department of Game v. Puyallup Tribe, Inc., 80 Wn 2d 561, 569, 497 P 2d 171, 177 (1972).

In this case, the District Court based on the agreement of the experts who testified before it defined conservation this way:

> "From a broad biological and managerial standpoint, conservation of fish resources means to protect and improve the habitat that produces the resource, to manipulate stocks of fish to achieve necessary spawning escapement so as to maintain, perpetuate and enhance the resource, and to put the harvestable portion of the resource to beneficial use." (384 F Supp 312 at 385)

But after recognizing that this was good fish biology and management, the District Court and the Ninth Circuit then inconsistently limited the power of the state to regulate treaty fishing of non-self-regulating tribes after advance judicial scrutiny to measures necessary for spawning escapement. The Ninth Circuit cited Antoine v. State, supra, in support of its limited definition. But Antoine v.

State did not raise conservation issues. This Court there merely restated the Puyallup rule that state regulation of Indian treaty fishing must be reasonable and necessary for conservation.

So all that is known is that the indispensability test rejected by this Court has again been resurrected by the Ninth Circuit.

This is not a play on words. The Ninth Circuit and District Court will only allow the state of Washington to determine for each run how many fish must escape the treaty Indian nets to allow for adequate spawning. Here are some examples of other conservation needs which are therefore beyond the regulatory power of Washington, unless the Ninth Circuit is reversed:

1. The regulation of mesh size in salmon fishing can prevent an incidental catch of the steelhead which are smaller.

2. The regulation of the timing of a fishing season can prevent the depletion of already threatened wild native stock, since they may enter a river at slightly different times than hatchery fish.

3. Preventing underfishing which can damage a run by increasing the competition among the fish for spawning areas.

4. Preventing certain techniques of harvesting fish, such as dynamite charges which cause waste, and the fish wheel, which has the potential of totally eliminating a run on a particular river.

5. Requiring the removal of nets from the water periodically, or fish will be wasted.

6. Varying fishing opportunities in different years, since on some runs all fish should escape for spawning, while on other rivers the run is so large that 85% or more can be safely harvested.

7. Preventing all fishing at the mouth of hatcheries when this would deplete the returning run necessary for the continuation of the hatchery program.
(These matters are discussed in the transcript and exhibits and in such standard texts as ROYCE, INTRODUCTION TO FISHERY SCIENCES, 1972, and VAN CLEVE AND JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHEASTERN PACIFIC, 1963).

The Ninth Circuit also affirmed the District Court's ruling that eleven Washington statutes could not be applied to treaty Indian fishermen. These statutes require good conservation practices, and now are only enforceable against all other citizens of the state. For example, one of these statutes, RCW 77.16.060 makes it unlawful to put poison or dynamite in the waters of the state with intent to kill game fish. Poison or dynamite could badly

damage or destroy a run of fish. The Ninth Circuit and District Court consider placing poison or dynamite in the waters of western Washington to be a treaty protected right so long as some fish escape.

B. TO STOP ABUSES OF POWER BY THE NINTH CIRCUIT AND DISTRICT COURT.

Federal courts have great power to remedy wrongs. But there are limits which have been exceeded in this case.

Possibly the Ninth Circuit and the District Court were led into error by sympathy. For 119 years these treaty Indians did not have the fishing opportunities promised them, as these treaties have now been interpreted. But there are also rights of other American and Canadian fishermen which were ignored.

1. THE DECISION OF THE NINTH CIRCUIT IN AFFIRMING A COMPLEX FISH ALLOCATION FORMULA AS A MATTER OF EQUITABLE DISCRETION IS IGNORING THE RIGHTS OF OTHER PEOPLE, CONTRARY TO THE DECISIONS OF THIS COURT IN PUYALLUP II AND MINNESOTA STATE SENATE v. BEENS, 406 US 187, 92 S Ct 1477, 32 L Ed 2d 1 (1972).

The treaties reserved to the tribes the right to fish "in common with all citizens of the territory." One of the treaties also reserves "the right in common with citizens of the United States to travel upon all public highways." (Treaty with the Yakimas, 12 Stat 951). In this case the District Court chose to quantify the right to fish. There is no evidence that the meaning of the words "in common" were discussed during treaty negotiations. The District Court cited no authority for the meaning of these words other than Webster's Dictionary, 1828 and 1862 editions, which define "common" as:

> "Belonging equally to more than one, or to many indefinitely....belonging to the public; having no separate owner ....general; serving for the use of all."

The District Court ignored the clear contemporaneous meaning of "in common" in connection with common use of public highways. It defined to fish "in common" to mean not a common use but a specific allocation. It held that the treaty tribes may catch:

1. All the fish they can catch on reservations (reservations are typically at the mouths of rivers); plus

2. All the fish they can eat; plus

3. All the fish they can use for ceremonies; plus

4. Fifty percent of all of the harvestable fish that reach their "usual and accustomed grounds and stations." (Some of these are described quite broadly in the Decision, such as, "marine areas of

Northern Puget Sound from the Fraser River south to the present environs of Seattle" for the Lummi, or ten rivers and their tributaries for the Yakimas, whose reservation is across the Cascade Mountains in Eastern Washington); plus

5. All the fish they can catch by hook and line anywhere in Washington in the regular sports season; plus

6. All the fish they can catch with commercial gear anywhere in Washington away from "usual and accustomed grounds and stations;" plus

7. Extra fish to replace the fish that do not reach the "usual and accustomed grounds and stations" (e.g., "Northern Puget Sound" for the Lummi Tribe) because they are caught by the Japanese or Russian fishing fleets which operate just outside United States territorial waters, or by Canadian fishermen, or by fishermen from

Alaska or Oregon.

The District Court argues for this seven element allocation formula by citing the canon that treaties are to be construed liberally in favor of the Indian tribes. Actually, it is impossible to defend this formula, or any other formula, as a matter of legal construction of treaty language.

The Ninth Circuit completely changes the basis for the allocation formula by making one modification, and then saying that this is a matter of sustaining the equitable discretion of the District Court. But an erroneous legal interpretation of language cannot be sustained with the cloak of equitable discretion. If the issue of treaty interpretation is legal rather than equitable, the Ninth Circuit should not switch to its views of the equities. Atlas Life Insurance Co. v. Southern Railroad, 306 US 563, 598 S Ct 657, 83 L Ed 987 (1939);

Hillsboro Township v. Cromwell, 326 US 620, 66 S Ct 445, 90 L Ed 358 (1945).

The error of the Ninth Circuit is that any sustaining of a fish allocation formula as a matter of equity forgets that the District Court was not attempting to balance equities. The District Court thought it was construing treaty language.

In Puyallup II this Court gave guidance for allocating the steelhead run on the Puyallup River with the identical treaty:

> "What formula should be employed is not for us to propose. There are many variables -- the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people." (Emphasis supplied) (38 L Ed 2d 254, at 258)

The District Court to the contrary said:

> "However, off reservation fishing by other citizens and residents of the state is not a right but merely a privilege which may be granted, limited or withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require." (384 F Supp 312, at 332)

There are limits even to the sins that may be committed in the name of "equitable discretion." When a District Court reached an unreasonable result in a reapportionment problem, this Court recently reaffirmed that "The remedial powers of an equity court must be adequate to the task, but they are not unlimited," Minnesota State Senate v. Beens, supra, 406 US 187,at 199 (1972).

This Court has been especially reluctant to allow the use of the federal court's equity powers to interfere with federal state relations, Schlesinger v. Councilman, ____ US ____, 95 S Ct 1300, 43 L Ed 2d

591 (1975): Burford v. Sun Oil Co., 319 US 315, 63 S Ct 1098, 87 L Ed 1424 (1943); Alabama Public Service Commission v. Southern Railroad Co., 341 US 341, 71 S Ct 762, 95 L Ed 1002 (1951).

The result of the Ninth Circuit decision is to ignore the fishing "rights of other people." When rights are ignored, there is no equity.

2. THE DECISION OF THE NINTH CIRCUIT SANCTIONS THE DISTRICT COURT INTERFERING WITH THE INTERNATIONAL RELATIONS OF THE UNITED STATES BY ISSUING INJUNCTIONS AGAINST THE STATE OF WASHINGTON REQUIRING IT TO DISOBEY ORDERS OF THE INTERNATIONAL PACIFIC SALMON FISHERIES COMMISSION OVER THE PROTESTS OF THE GOVERNMENT OF CANADA.

The International Pacific Salmon Fisheries Commission (hereinafter "IPSFC"), an international body established by treaty in 1937 between the United States and Canada, regulates the harvest of sockeye and pink salmon returning to the Fraser River system in Canada. The runs have been vastly increased

due to the efforts of IPSFC.

The District Court in its opinion recognized that "treaty right fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the Commission." (384 F Supp 312, at 411). The District Court then ordered an "equitable adjustment" to the tribes for fish destined for "usual and accustomed grounds and stations" for fish caught by Canadian, Japanese, and Russian fishermen. This was the only part of the District Court order modified by the Ninth Circuit which said:

> "We agree with the state that the court's equitable discretion does not extend so far as to permit it to compensate the tribes for the unanticipated heavy fishing by foreign ships off the coast."

The Ninth Circuit then added:

> "The court therefore may adjust equitably the treaty Indians' share to compensate them for fish taken by

> other Washington citizens under regulations issued by the International Pacific Salmon Fisheries Commission which otherwise would be available for harvest at their traditional treaty areas."

Instead, the District Court proceeded to order the state of Washington to disobey the orders of the IPSFC. On July 16, 1975, the District Court ordered Washington to establish a treaty Indian fishery in the Straights of Juan de Fuca that was more extensive both by time and gear than allowed by the IPSFC. The court then stayed most of the order "pending the conclusions of discussions between representatives of the United States and Canada now scheduled for Friday, July 18, 1975."

On July 18, 1975, a meeting was held between the United States and Canada to consider changing the IPSFC regulations to allow the additional special fishery for United States treaty Indians ordered by the District Court. An official of the

United States State Department headed the United States delegation. An agreement was not reached bewteen the two nations, and the United States State Department told Canada that it could not obey the regulations of IPSFC because of the order of the District Court. Further American state and federal court proceedings followed which are discussed in Section C below. On July 25, 1975, the IPSFC through its Chairman, W. R. Houston of the Department of the Environment,of Vancouver, British Columbia, protested to Dr. Henry Kissinger, United States Secretary of State.

On July 30, 1975, the District Court vacated the stay and put into effect the portion of the injunction preventing the state from interfering with the treaty Indians fishing with gear forbidden by the IPSFC. On August 8, 1975, the District Court enjoined the state from interfering

with the Swinomish Tribe seven day a week fishery in IPSFC waters which violated the time limitations imposed by the IPSFC. On August 15, 1975, the government of Canada in Ottawa informed the government of the United States of its objections to the unilateral actions of the United States in response to the District Court orders. The statement said "Canada considers this action to be contrary to the provisions of a bilateral convention." (These facts are all set forth in the material submitted to the Ninth Circuit in support of the Motion to Stay.)

Fortunately the IPSFC fishery ended on September 28, 1975. Millions more pink and sockeye salmon will be coming into IPSFC waters in 1976 and the matter remains unresolved.

C. TO RESOLVE CONFLICTS BETWEEN THE COURTS OF THE STATE OF WASHINGTON AND THE COURTS OF THE UNITED STATES.

The decisions of the Ninth Circuit and District Court conflict with decisions of the Supreme Court of Washington, and of the superior courts of Pierce and Thurston counties of Washington. These conflicts need to be resolved by this Court both as a matter of substantive law and for the proper inter-relationship of state and federal courts in the federal system.

1. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH THE WASHINGTON SUPERIOR COURT DECISION ON REMAND FROM THIS COURT IN PUYALLUP II, AND MAY CONFLICT WITH THE APPEAL FROM THAT DECISION WHICH HAS BEEN ARGUED BUT NOT YET DECIDED BY THE SUPREME COURT OF WASHINGTON.

In Puyallup II, this Court instructed the state courts of Washington to determine whether hatchery fish which are paid for with the license fees and tags of sports fishermen are included within the treaty fishery,

and to develop a pattern of state regulation and allocation for the steelhead runs on the Puyallup River which balances the rights of Puyallup Tribe, Inc. with the rights of other people. These issues have been decided by the Superior Court of Pierce County, Washington, after a ten day trial. The Opinion, Findings of Fact, Conclusions of Law, and Decree are in the Appendix. The appeal from that decision was argued before the Supreme Court of Washington on September 15, 1975, after the granting of a Motion to Expedite, but no decision has been rendered as of the date of the writing of this petition. The decision will be forwarded to this Court as soon as it is available. Since the losing party, in the Washington Supreme Court, whichever it is, will undoubtedly petition for certiorari, this Court will then have the opportunity of granting certiorari in both cases

and having them argued together.

In the meantime, the Superior Court decision is the law of that case. The Superior Court in Puyallup III (the remand case) is in diametric opposition to the Ninth Circuit on a different record which involves the same Treaty and many of the same parties. The state court:

1. Defines conservation as wise use rather than only indispensability to optimum spawning.

2. Finds that the Puyallup Tribe fishery,if unregulated by the state,constitutes a threat to conservation.

3. Excludes the hatchery run from the Treaty.

4. Orders that the hatchery run is entitled to safe passage through the Puyallup reservation.

5. Finds,after an examination of the Treaty negotiation materials,that the words

"in common" were not intended to create a "division of ownership of fish."

Thus at the present time the hatchery run of steelhead on the Puyallup River is excluded from the treaty fishery by state court order but the hatchery run of steelhead on other western Washington rivers is included in the treaty fishery by federal court order. On the Puyallup River the hatchery steelhead cannot be caught on the reservation, while on other western Washington rivers where there is a reservation at the mouth of the river, a trap could be built across the river in the reservation catching all of the fish.

2. THE DECISION OF THE NINTH CIRCUIT SANCTIONS DISTRICT COURT INJUNCTIONS WHICH LEAVE THE OFFICIALS OF WASHINGTON STATE IN VIOLATION OF EITHER STATE OR FEDERAL COURT INJUNCTIONS ON THE SAME SUBJECT.

In 1974, the Washington Department of Fisheries reduced the salmon fishing season

for gill netters and purse seiners in the Puget Sound Marine fishery. These two commercial fishing groups were denied intervention in this case by the District Court. They then went to the only forum open to them, the Superior Court of Thurston County, and obtained an injunction against the Washington Department of Fisheries on the grounds of irreparable harm to their livelihood. This state court injunction was enjoined by the District Court without granting a hearing to the affected commercial fishermen.

Once again in 1975 a conflict arose between state and federal courts. On July 23, 1975, after the District Court had ordered the Department of Fisheries to disobey the orders of IPSFC, as set forth in Section B above, the purse seiners and gill netters went into the Superior Court of Thurston County and obtained an

injunction requiring the Department of Fisheries to obey the orders of IPSFC as required by RCW 75.40.060.

On August 6, 1975, the District Court upon oral motion of the United States without notice to the State of Washington Superior Court, enjoined the Superior Court injunction of July 23, 1975 as amended on August 1, 1975, and denied certification of the court's order for expedited appeal. The state of Washington cited cases such as Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 US 281, 90 S Ct 1739, 26 L Ed 2d 234 (1970), which limit federal injunctions against state court injunctions, but on August 20, 1975, the Ninth Circuit denied a stay of the District Court order.

The Superior Court case proceeded to judgment on September 19, 1975. That same

day the Department of Fisheries appealed to the Supreme Court of Washington and asked for a stay of the Superior Court judgment. The motion for stay of judgment was argued before the Supreme Court of Washington en banc on September 22, 1975. On September 23, 1975, the Supreme Court of Washington denied a stay of the Superior Court order. All of these orders are in the Appendix.

The Director of the Washington Department of Fisheries is now under injunction by the District Court which the Ninth Circuit refused to stay to disobey the directives of the IPSFC issued pursuant to a 1937 Treaty between the United States and Canada. He is also under injunction by the Superior Court which the Supreme Court of Washington refused to stay to obey the directives of the IPSFC. No more direct conflict between state and federal courts could even be imagined.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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